Shafi v Darani & another (Civil Appeal 12 of 2015)
[2019] KEHC 12485 (KLR) (1 February 2019) (Ruling)

Neutral citation: [2019] KEHC 12485 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

CIVIL APPEAL 12 OF 2015

M THANDE, J

FEBRUARY 1, 2019

BETWEEN

KHADIJA KHAMIS SHAFI ..... APPLICANT

AND

ALI MOHAMED DARANI ..... 1ST RESPONDENT

ALIYA ZAHRAN ..... 2ND RESPONDENT

RULING

1. By an application dated 13.3.18 (the Application), Khadija Khamis Shafi, the Applicant seeks leave of the Court to give additional documentary evidence in the Appeal. She also seeks that such evidence be deemed as forming part of the Record of Appeal from the date of filing. The grounds upon which the Application is premised are set out in the Application as well as in the Supporting Affidavit of the Applicant sworn on 13.3.18.

2. The Applicant claims that the underlying subject matter of the proceedings in this matter comprise of various fraudulent activities and dealings done on the Wakf property by Ali Mohamed Darani and Aliya Zahran, the Respondents herein. That while proceedings were pending before this Court, the 1st Respondent entered into several leases on Wakf properties and the Applicant has just gotten hold of the leases and certificates of titles which she intends to rely on as additional documents. The additional documents prove that the 1st Respondent has no intention of preserving the Wakf but of benefitting himself solely. It was not possible to obtain the said additional evidence during the hearing of the suit in the Kadhi's Court. It is in the interest of justice that the said documents are admitted as evidence in the Appeal for the just and fair determination of the Appeal and in order to prevent a miscarriage of justice.

3. The 1st Respondent has by his Replying Affidavit sworn on 19.12.18 opposed the Application. He dismisses the same as frivolous, vexatious and an abuse of the Court process and ought to be struck out. The Applicant has since filing the Appeal on 2.5.15 failed to file the record of appeal and set down the

Appeal for hearing. The main grounds of the Appeal were based on the judgment of the Hon. Kadhi which determined whether the Wakf could be divided and separately administered as per Islamic law. The issues arising 2 years after the judgment could not have been obtained during trial and therefore cannot form part of the documentary evidence in the Appeal. The Applicant's intention is to delay the execution of the judgment for almost 4 years. He stated that he entered into the leases lawfully in his capacity as the trustee of the Wakf. Both leases are in the process of being cancelled and the Applicant has filed Suit No. 53 of 2018 in the Environment and Land Court.

4. The 1st Respondent further averred that the Wakf properties are wasting, have little or no income and have been invaded by trespassers. As trustees, his actions and intentions are without malice and illegality and were in the best interest of the Wakf in which he too is a beneficiary. He urged the Court to find that the Application lacks merit and dismiss the same. He urged that the Appeal be set down for hearing or be dismissed for want of prosecution with costs to the 1st Respondent.

5. The Court notes that the 2nd Respondent did not file a response to the Application.

6. I have considered the Application, the grounds in support thereof, the able submissions by parties and the law. The jurisdiction of the Court to admit new evidence is provided in Section 78 of the *Civil Procedure Act* as follows:

> (1) Subject to such conditions and limitations as may be prescribed, an appellate court shall have power—
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> (a) ...
>
> (b) ...
>
> (c) ...
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> (d) to take additional evidence or to require the evidence to be taken;

7. The prescribed conditions and limitations are contained in Order 42 Rule 27 which provides:

> (1) The parties to an appeal shall not be entitled to produce additional evidence, whether oral or documentary, in the court to which the appeal is preferred; but if—
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> (a) the court from whose decree the appeal is preferred has refused to admit evidence which ought to have been admitted; or
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> (b) the court to which the appeal is preferred requires any document to be produced or any witness to be examined to enable it to pronounce judgment, or for any other substantial cause, the court to which the appeal is preferred may allow such evidence or document to be produced, or witness to be examined.

8. For this Court to exercise its discretion to admit the new evidence, the Applicant must demonstrate to the Court that the Court below declined to admit the evidence which ought to have been admitted. New evidence may also be admitted if this Court requires the same to be produced. The Applicant is not saying that the trial Court refused to admit evidence which ought to have been admitted. Indeed the Applicant stated that the leases the admission of which she seeks were entered into after the delivery of the impugned judgment.

9. Further, the principles on which a Court may exercise its discretionary power to determine whether or not to admit additional evidence were expressed by Chesoni, Ag JA (as he then was) as follows:

> The principles upon which an appellate court in Kenya in a civil case will exercise its discretion in deciding whether or not to receive further evidence are the same as those laid down by Lord Denning LJ, as he then was, in the case of Ladd v Marshall [1954] 1 WLR 1489 at 1491 and those principles are:
>
> (a) It must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial;
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> (b) The evidence must be such that, if given, it would probably have an important influence on the result of the case, though it need not be decisive;
>
> (c) The evidence must be such as is presumably to be believed, or in other words, it must be apparently credible, though it need not be incontrovertible."

10. Given that the additional evidence namely the leases were entered into by the 1st Respondent subsequent to the impugned judgment, it cannot be said that the evidence could not have been obtained with reasonable diligence for use at the trial. The said evidence simply did not exist at the time of trial. There is also no way the additional evidence would probably have an important influence on the outcome of the case in the lower Court as it did not exist.

11. The Court must caution itself against admitting new evidence that will enable the Applicant make out a fresh case on appeal thereby giving him another bite at the cherry. Chesoni, Ag JA (as he then was) went on to state:

> Additional evidence should not be admitted to enable a plaintiff to make out a fresh case in appeal. There would be no end to litigation if the rule were used for the purpose of allowing the parties make out a fresh case or to improve their case by calling further evidence. It follows that the power given by the rule should be exercised very sparingly and great caution should be exercised in admitting fresh evidence.

12. As the documents which the Applicant seeks to have admitted came into existence subsequent to the impugned Judgment, the same cannot be admitted. I am duly guided by the Court of Appeal in Kenya Anti-Corruption Commission v Willesden Investments Limited & 7 others [2018] eKLR. The Court of Appeal declined to admit evidence that arose subsequent to the delivery of the ruling appealed against and stated:

> Quite apart from the fact that the additional evidence consists of material that has come into existence subsequent to the rendering of the impugned ruling, it does not in our view speak to the question arising in the appeal, namely, whether Judge properly exercised his discretion in striking out/dismissing the suit. In the words of the Court in Mzee Wanje and 93 others v A K Saikwa and others (above) that material is not needful for the task the Court will be required to discharge in determining the appeal before it.

13. This Application appears to be an attempt by the Applicant to make out a fresh case or improve his case by calling new evidence that came into existence subsequent to the impugned Judgment. To allow the Application would be to give unfair advantage to the Applicant and further prolong the matter, yet there must be an end to litigation.

14. In the circumstances I find no merit in the Application and the same is hereby dismissed with costs to the 1st Respondent.

DATED, SIGNED AND DELIVERED IN MOMBASA THIS 1ST DAY OF FEBRUARY 2019

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M. THANDE

JUDGE

In the presence of: -

..... **for the Applicant**

..... **for the Respondent**

..... **for the Respondent**

.....**Court Assistant**